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THE CLEVELAND TERMINAL & VALLEY RAILROAD COMPANY,
AND
THE DETROIT & CLEVELAND NAVIGATION COMPANY,
Appellants,
vs.
THE CLEVELAND STEAMBOAT COMPANY,
Appellee.

No. 84

Brief for Appellee.

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Proctor for Appellee.

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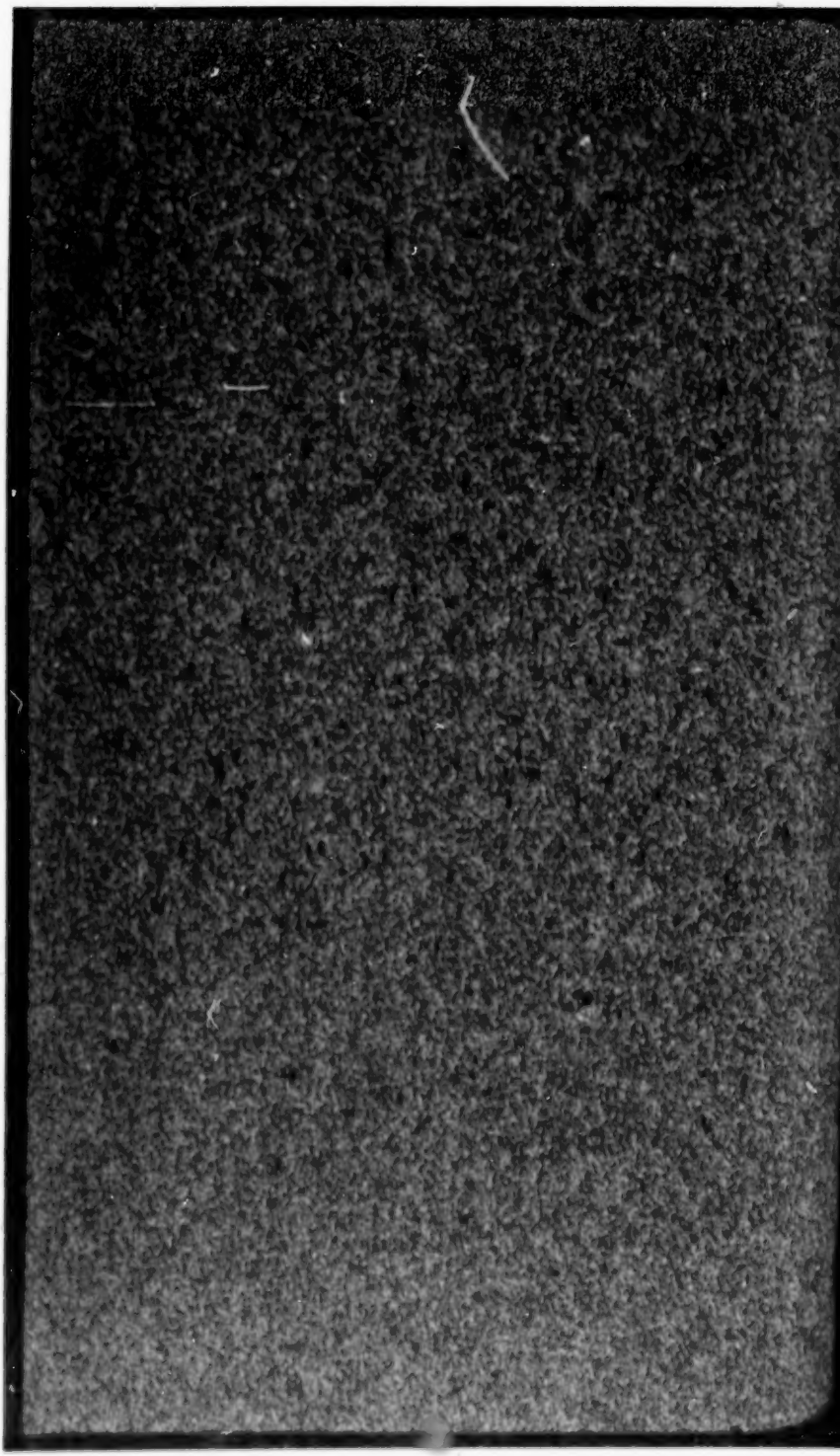

Supreme Court of the United States.

OCTOBER TERM, 1907.

THE CLEVELAND TERMINAL & VALLEY RAILROAD AND THE DETROIT & CLEVELAND NAVIGATION COMPANY, Appellants,

vs.

THE CLEVELAND STEAMSHIP COMPANY, Appellee.

No. 84.

STATEMENT OF THE CASE.

In January, 1904, the steamer Reis, during a heavy flood, broke from her winter moorings in the Cuyahoga River, and drifting down, struck the merchant propeller Moore, parting her mooring and forcing her against the steamer Eads, putting her adrift; all three being carried down with the current.

The Cleveland Terminal & Valley Railroad Company owns and operates a bridge across the Cuyahoga River below the mooring point of the vessels named above, the bridge being equipped with a swinging span (supported by a center abutment or pier in the navigable channel), for the passage of vessels. Surrounding the center abutment is piling, driven into the ground, commonly known as spring piling, the purpose of which is to fend off passing vessels and protect the work and vessels from damage.

The center pier of the bridge is in the navigable channel; the shore abutments are substantially and for the case may be regarded as on the dock lines.

The railroad company and its co-libelant, The Detroit & Cleveland Navigation Company, jointly own a dock below, constructed on piles driven in the bed of the stream and ashore; it is floored over but open underneath; an extension of the shore.

As the vessels drifted down, the Moore struck and damaged this dock, for which $419.70 is claimed. (17)

The Eads' stern brought up against a pier below the bridge, the Moore brought up against the dock abreast of the Eads, and the Reis drifting stern first, entered between the Eads and the Moore, and, it is claimed, in so doing forced the Eads into collision with the center pier of the Railroad Company's bridge, damaging the protection piling about the same, and for this a damage of $2770.26 is claimed.

It is also averred that as the three vessels were wedged together at the bridge, the stream was partially dammed, causing the water to raise, increasing the velocity of the current underneath the keels of the Eads and Reis, so that the current so increased undermined the center pier and shore abutment, carried away some of the protection piling, and for restoring the protection piling and support under the center pier, and the pier to its former strength and durability, $18,942.00 is claimed.

It is further claimed that by reason of the disaster the Railroad Company was deprived of the use of its bridge for a period of ten days, and necessarily incurred expense (in the transporting of its cars across the river by other means), to the amount of $1257.50.

It will be noted that the following damages are included in the libel:

I. Damage to shore dock by a vessel being forced against it by the vessel proceeded against.

II. Damage to bridge protection piling and pier by a vessel being forced against it by the vessel proceeded against.

III. Damage to shore dock, abutment, protection piling and the pier and dock foundations by wash said to be due to increased current arising from partial damming of the stream by the three vessels, brought into such position by the alleged fault of the vessel proceeded against.

Libel *in rem* was filed against the steamer "William E. Reis" in the United States District Court for the Northern District of Ohio for all this damage. On exception being taken to the jurisdiction, the District Court ruled that the libel did not state a case within the jurisdiction.

The certificate of the Court below, which includes the libel in full, certifies four questions (19):

> (1) "Has this Court, sitting in Admiralty, jurisdiction to entertain this libel, based on the damage done to said dock, center pier and protection piling, located in the navigable waters of the Cuyahoga River, as above set forth, attached to the river bottom by piling driven therein, constructed in the manner and maintained for the purposes above set forth; said damage thereto consisting of the breaking in of said dock and its timbers and piling and the breaking in, undermining and carrying away of said protection piling and the piling supports of said center pier; said injury and damage being caused by the negligent and wrongful breaking adrift of said propeller Reis, and her collision with said propellers Moore and Eads, the drifting of said vessels partially through said bridge draw and into collision with said protection piling and center pier, their collision with said dock, and the wedging together of said vessels in and below the draw of said bridge, in the manner above stated?"
>
> (2) "If this Court has not jurisdiction over all such damage, has it jurisdiction to entertain a libel based on the damage done to said dock?"
>
> (3) "Has it jurisdiction over the damage so done to said protection piling?"
>
> (4) "Has it jurisdiction over the damage so done to said center pier?"

ARGUMENT.

The extended brief of appellants presents a variety of considerations under three headings:

I.

That under the previous holdings of this Court these claims are within the jurisdiction "because the wrong and the injuries complained of were wholly consummated in navigable water."

II.

"The constitutional grant of Admiralty Jurisdiction should be construed to cover the case made in this libel."

III.

"Every case of physical injury to persons or property, caused by the negligent act of a ship, while such ship is in navigable water, should be held to fall within the jurisdiction of admiralty, regardless of the locality of the person or property so injured."

It does not seem necessary or even convenient to follow this division. A single consideration is required, and that is, What constitutes a maritime tort within the constitutional grant of jurisdiction to the Federal Courts?

For many years, in cases of tort, locality has been regarded as the test of jurisdiction, and the meaning of "locality" has been that the origin of the wrong and its consummation or substantial consummation on or in navigable waters and the interest damaged, maritime in character; that the locality is the place of the thing injured and not of the agent causing it.

In any consideration of jurisdiction in admiralty, convenience and desirability may not be regarded; the sole question in every case is and must be whether the constitutional grant of jurisdiction includes or excludes the particular claim.

We shall endeavor to confine our consideration to tort cases, since in cases of contract the determining principles are fixed beyond reasonable question; further, as to contracts, frequently mixed cases arise not germaine to the present consideration. As this Court said:

> "These mixed cases, however, will be found, not cases of tort, but of contract, which do not depend altogether upon locality as the test of jurisdiction, such as contracts of material-men, for supplies, charter-parties, and the like. These cases depend upon the nature and subject-matter of the contract, whether a maritime contract, and the service a maritime service to be performed upon the sea, or other navigable waters, though made upon land. The cases of torts to be found in the admiralty, as belonging to this class, hardly partake of the character of mixed cases, or have, at most, but a very remote resemblance."
>
> *The Plymouth*, 3 *Wallace*, 20-34.

While it has been supposed that the test of locality, as defined by this Court in

The Plymouth, supra,

was to be applied in all cases of tort, as the subject matter is in cases of contract, the decision of this Court in

The Blackheath, 195 U. S., 361,

has raised doubt in the minds of some as to whether it was (or not) the intention of the Court to apply some other measure as the final test.

The opinion in that case, when considered in connection with the concurring opinion of Mr. Justice Brown, evidences that in that case the questions here involved, and the further question of damage to the swinging portion of a draw bridge over navigable waters—a question directly presented in Case No. 284, October Term, 1907,—were all considered by the Court, Mr. Justice Brown in concurring taking the view that the effect of the decision in ***The Blackheath*** was to overrule,

The Plymouth, 3 Wallace, 20

Phoenix Insurance Company, 118 U. S., 610, and

Johnson vs. Chicago & Pacific Elevator Company, 119 U. S., 388,

and to recognize the principle adopted in England *by statute*, extending jurisdiction there in tort cases, to "any claim for damages by any ship."

The decision of the Court, however, holds that the opinion in *The Blackheath* is not opposed to any of its prior adjudications or any of the principles announced therein, and, without entering into the elements of distinction between that case and *The Plymouth*, said (page 367):

> "It is enough to say that we now are dealing with an injury to a government aid to navigation from ancient times subject to the admiralty, a beacon emerging from the water, injured by the motion of the vessel, by a continuous act beginning and consummated upon navigable water, and giving character to the effects upon a point which is only technically land, through a connection at the bottom of the sea."

While the jurisdiction in this country may not be limited in particulars as in England or in France or in any other maritime

nation where it is subject to legislative control, neither may it (by parity of reason) be extended so as to be as broad as in other countries where it is subject to constant change by legislative action. The jurisdiction in admiralty here can neither be enlarged nor restricted by legislative act. It is fixed by the constitutional grant as interpreted by this Court. We think this Court in saying (page 367),

> "that the Constitution does not prohibit what convenience and reason demand,"

did not mean to say that, in determining a question of jurisdiction it would be controlled by convenience, since it is a cardinal rule that written constitutions should receive unvarying interpretation:

> "A principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion."
>
> Cooley, Cons. Lim., p. 88.

Or that in saying (page 364),

> "it would be a strong thing to say that Congress has no constitutional power to give the admiralty here as broad a jurisdiction as it has in England or France,"

the Court meant to say that Congress could enlarge or restrict the jurisdiction of a federal court authorized to hear and determine causes of admiralty and maritime jurisdiction.

That Congress can neither enlarge nor restrict jurisdiction in admiralty is axiomatic. It may provide courts to exercise the jurisdiction and designate methods of procedure, but beyond that it is *powerless*.

So when Congress (5 St. at L., February 26, 1845), sought to extend jurisdiction to the Great Lakes, thereto believed to be waters not within the jurisdiction, this Court held that such act could not be supported under the commerce clause of the constitution:

> "the Constitution declares that the judicial power of the United States shall extend to 'all cases of admiralty and maritime jurisdiction.' But it does not direct that the Court shall proceed according to ancient and established forms, or shall adopt any other form or mode of procedure. *The grant defines the subjects to which the jurisdiction may be extended by Congress.*"
>
> *The Genesee Chief*, 12 How., 443-460.

Therefore, the Court said that as to a trial by jury, Congress could so provide.

But, when the question arose as to whether the act could be looked to as defining or limiting the jurisdiction, the Court found no difficulty in concluding that it was ineffectual, even obsolete to that end:

> "and, as it was an act, on the face of it, and as intended, in its purpose and effect, to extend the admiralty jurisdiction to these waters, we cannot, without utterly disregarding this purpose and intent, give effect to it as a limitation or restriction upon it. We must, therefore, regard it as obsolete and of no effect, with the exception of the clause which gives to either party the right of trial by jury when requested, which is rather a mode of exercising jurisdiction than any substantial part of it."
>
> *The Eagle*, 8 Wall., 15-25.

So we say, while this Court may give the broadest interpretation of the Constitution which the language warrants (since Congress cannot enlarge the jurisdiction),

The Blachheath, 195 U. S., p. 369.

The St. Lawrence, 1 Black, 522-526,

it may not in determining a particular case, be moved by what England or France, under legislative act has or may do, or be moved by convenience of desirability.

> "Judicial power, in all cases of admiralty and maritime jurisdiction, is delegated by the Constitution to the Federal Government in general terms, and courts of this character had then been established in all commercial and maritime nations, differing, however, materially in different countries in the powers and duties confided to them; the extent of the jurisdiction conferred depending very much upon the character of the government in which they were created; and this circumstance, with the general terms of the grant, rendered it difficult to define the exact limits of its power in the United States.
>
> "This difficulty was increased by the complex character of our Government, where separate and distinct specified powers of sovereignty are exercised by the United States and a State independently of each other within the same territorial limits. And the reports of the decisions of this court will show that the subject has often been before it, and carefully considered, without being able to fix with precision its definite boundaries; but certainly no

State law can enlarge it, *nor can an act of Congress or rule of court make it broader than the judicial power may determine to be its true limits. And this boundary is to be ascertained by a reasonable and just construction of the words used in the Constitution, taken in connection with the whole instrument, and the purposes for which admiralty and maritime jurisdiction was granted to the Federal Government.*"

The St. Lawrence, 1 Black., 522-526.

In our view, the prior decisions of this court do not warrant holding the claims here presented to be within the jurisdiction, and the facts do not warrant change of decision to bring these claims, or claims for damage to the swinging draw of a bridge across navigable waters within the jurisdiction.

In delivering opinion in

The Plymouth, 3 Wall., 20-33.

Mr. Justice Nelson said:

> "The origin of the wrong was on the water, but the substance and consummation of the injury, on land. It is admitted by all the authorities, that the jurisdiction of the admiralty over marine torts depends upon locality—the high seas, or other navigable waters within admiralty cognizance; and, being so dependent upon locality, the jurisdiction is limited to the sea or navigable waters not extending beyond high water mark."

Then, after speaking of mixed cases most frequently occurring in matters of contract, and of cases of personal injury commencing on land but consummated on the high seas or other navigable waters, the learned Justice continues (34):

> "This class of cases may well be referred to as illustrating the true meaning of the rule of locality in cases of marine torts, namely, that the wrong and injury complained of must have been committed wholly upon the high seas or navigable waters, or, at least, *the substance and consummation of the same* must have taken place upon these waters to be within the admiralty jurisdiction. In other words the cause of damage, in technical language, whatever else attended it, must have been there complete."

Again (36):

> *"the whole, or at least the substantial cause of action arising out of the wrong; must be complete within the*

locality upon which the jurisdiction depends—on the high seas or navigable waters."

In subsequent decisions of this court and of the lower courts, the principles so announced have been accepted as defining the jurisdiction in tort cases. It is true that in the case of *The Plymouth* the agency (fire), negligently set in motion from or by the ship, had nothing of a maritime character attached to it; but in

Johnson vs. Chicago & Pacific El. Co., 119 U. S., 388,

the damage was caused by the jib-boom of a vessel, in tow of a steam tug, negligently striking and damaging an elevator and contents, and the Court, under the authority of *The Plymouth* and *Ex Parte Phoenix Ins. Co.*, held that the cause of action did not arise in a maritime tort and a court of admiralty was without jurisdiction.

It was, however, a damage done *by* a vessel navigating waters within the jurisdiction, and while

"It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used,"

Cohens vs. Virginia, 6 Wheat., 264,

it nevertheless remains that under the law (so far declared by this court) *something more* must be present than fact of damage *by a ship*, to bring a case within the jurisdiction.

Nor, as it seems to us, did the Court in *The Blackheath* even intimate intention to depart from the principles announced in the earlier cases. While there are some statements in the opinion seemingly at variance with what the profession has regarded as settled, *viz.*, that permanent attachment of the damaged property to the soil would debar jurisdiction in admiralty, in each instance the opinion couples the observation with a saving clause or illustration or limitation evidencing intent not to traverse previously announced and accepted doctrines. So while the Court says (365) that it seems more arbitrary than rational to treat attachment to the soil as peremptorily barring jurisdiction, in juxtaposes this with the consideration that the injured thing in that case was

"an instrument of navigation and no part of the shore,

> but surrounded on every side by water, a mere point projecting from the sea."

The injured property was an "instrument of navigation;" this seems to be emphasized.

Again we find the same coupling of the special character of the property, and the adherence to principles theretofore announced by the Court, where it says (367) that it is dealing with an injury to

> "a government aid to navigation from ancient times subject to the admiralty, a beacon emerging from the water, injured by the motion of the vessel, by a continuous act *beginning and consummated* upon navigable water."

We read the opinion, therefore, as meaning only that by reason of the character of the property damaged, with the fact that the wrongful act originated and was consummated on navigable waters by damage to an aid to navigation, jurisdiction was entertained.

The Court makes some observations which, taken by themselves, might be subversive of rules previously announced, but they are in fact only illustrative of the question under consideration. Like other observations on questions not completely investigated, if they go beyond the particular case,

> "they may be respected, but ought not to control the judgment in a subsequent suit when the point is presented for decision."
>
> *Cohens vs. Virginia*, 6 Wheat., 264.

Thus, while the Court says (367) that it has never been decided that every fixture in the midst of the sea was governed by the same rule, but that the contrary "has been supposed" by some cases, citing

> *The Arkansas*, 17 Fed., 383-387.
>
> *The F. & P. M. No. 2*, 33 Fed., 511-515.

we do not take this as evidencing renunciation of the principle that damage to realty is not within this jurisdiction, but only as an observation related to this particular case, and the special character of the property injured.

In *The Arkansas*, the court, in denying jurisdiction, said *arguendo* that jurisdiction would be entertained for damages done

to a lawful structure in the navigable bed of a river, and in his judgment the question was not determinable or dependent upon the question of whether it was solid or floating, realty or personalty, firmly fixed in bed of river or not, but he says (387) he knows of no case in the books "and the industry of counsel seems to have found none" in which jurisdiction has been entertained of a tort "committed or *consummated* upon the land," and accepting the doctrine of *The Plymouth*, holds that damages to structures along the shore or bank are not within the jurisdiction.

The F. & P. M. No. 2 was a cause of collision between a steamer and a raft of logs in tow of a tug. The court entertained jurisdiction, saying (p. 513):

> "This collision occurred upon navigable waters, over which, confessedly, the admiralty has jurisdiction. As a subject of commerce, the raft or boom of logs was being transported from one port to another in tow of the tug. *Its relation to the tug was somewhat in the nature of cargo. Both the raft and the steamer which inflicted the injury were at the time, actually engaged in navigation.*"

It is true that he later approved the *dictum* of Judge Love in *The Arkansas*, but the question was not involved, and the decision was predicated on the matter above quoted.

The distinction as to rafts has been recognized (in salvage cases) by this court.

Cope vs. Vallette Dry Dock Co., 119 U. S., 625-630.

The Robert W. Parsons, 191 U. S., 17-34,

but has not been accepted in England, where the *Cope* case was considered by the House of Lords and jurisdiction of a claim for salvage *as to a floating beacon* denied.

Wells et al. vs. The Gas Float Whitton, 8 Asp. M. L. C., 272.

But the *dictum* of *The Arkansas* and *F. & P. M. No. 2* has not been accepted even by the lower courts;

The City of Milwaukee, 37 Fed., 705-707,

The Professor Morse, 23 Fed., 803-807,

and we cannot read the opinion of this court in *The Blackheath* as showing approval of the *dictum* of Judge Love in *The Arkansas*. It does not seem to us to have been used other than by way

of illustration, since it is contrary to *The Plymouth*, and other cases, which are not overruled or questioned.

DECISIONS OF LOWER COURTS.

If we consider other cases, it will be found that they uniformly accept the doctrine of *The Plymouth* as declaring the true test, and they would deny jurisdiction herein.

In *Herman vs. Mill Company*, 69 Fed., 646,

the Court held that the true and rational solution of the question of jurisdiction in cases of tort is to ascertain the place of *consummation* of the injury.

In *The Strabo*, 90 Fed., 110,

(a ladder case), it was found that the wrongful agency and its *consummation* took place on the ship and jurisdiction was entertained.

In *The H. S. Pickands*, 42 Fed., 239,

a man was engaged in repairing a vessel at wharf, and was injured by the slipping of a ladder leading to the ship, throwing him upon the dock. Judge Henry Billings Brown held the cause not within the admiralty, and his decision was affirmed by Mr. Justice Brewer on appeal.

In *The Mary Garrett*, 63 Fed., 1009,

a seaman on dock was injured by negligence originating on shipboard; jurisdiction was denied, notwithstanding he claimed, as part of his damages, loss of wages as seaman. Judge Morrow held that, as the action was brought primarily for damages for a personal injury and the claim for wages was incidental, the jurisdiction could not be maintained.

In *The John C. Sweeney*, 55 Fed., 540,

the question was as to damage done to the swinging portion of a bridge. The Court held that although the tort was committed on water, its consummation was reached on land, and therefore jurisdiction could not be maintained.

In *The Accame*, 20 Fed., 642,

damage to a wharf was claimed, and jurisdiction denied.

In *The City of Lincoln*, 25 Fed., 835,

as the fault and the damage both occurred in navigable waters, jurisdiction was sustained.

In *The Strabo*, 98 Fed., 998,
jurisdiction was sustained because the wrongful agency operated and took effect on the ship.

In *The Albion*, 123 Fed., 188,
a man endeavoring to walk on shipboard fell into the water as the gang plank had been removed; jurisdiction denied.

In *The Haxby*, 95 Fed., 170, and
The Curtin, 152 Fed., 588,
a pier was damaged and property thrown into the water; jurisdiction denied.

In *Chalmers vs. Howell*, 8 Benedict, 547; F. C., 9302, a derrick on dock was damaged by contact with a vessel. Judge Blatchford denied jurisdiction, saying that the locality of the injury is the locality of the thing injured, and not of the agency.

In *Lake Shore & Michigan Southern Railway Co.* vs. the *Neil Cochran;* F. C., 7996, Brown, Adm., 162, damage was claimed for injury to the swinging portion of a railroad bridge across the Cuyahoga River; jurisdiction denied.

In *The Mary Stewart*, 10 Fed., 137,
a man standing on a wharf was injured by a bale of cotton falling as it was being hoisted aboard; jurisdiction was denied.

The question has arisen in many cases in the lower courts, and each time the line of inclusion has been drawn, under the decisions of this court, at

Torts occurring on or having their substantial consummation on waters within the jurisdiction where the property damaged is maritime, including in this, since *The Blackheath* case, a damage to an aid to navigation.

Unless this is to be extended to embrace "all damage done by any ship," such claims as are presented here are not within the jurisdiction, and it also excludes a damage to the swinging part of a draw bridge, a question now pending in this court.

Judge Hughes said:

> "If the injury complained of happened on land, it is not cognizable in the admiralty, even though it may have originated on the water. *The Plymouth*, 3 Wall, 20. This springs from the well known principle, that there are two essential ingredients to a cause of action, viz., a wrong,

and damage resulting from that wrong. Both must concur. To constitute a maritime cause of action, therefore, not only the wrong must originate on water, but the damage—*the other necessary ingredient*, must also happen on water."

The Mary Stewart, 10 Fed., 137-138.

The Court said further (p. 138):

"Wharves and bridges are but improvements or extensions of the shore. They are fixed and immovable, and are a mere continuation and part of the real estate to which they are attached. And this is the case, whether they project over the water or not. Injuries done to or on them, therefore, are not cognizable in the admiralty."

So this Court, speaking by Mr. Justice Field, in

The Rock Island Bridge, 6 Wall., 213-216,

after showing that a statement attributed to Dr. Lushington, in

The Volant, 1 Wm. Rob., 388,

to the effect the "origin of the questions to be decided, and the locality," not the object affected, was determinative, was either not correctly reported or inaccurate, the Court said:

"A maritime lien can only exist upon movable things engaged in navigation, or upon things which are the subject of commerce on the high seas or navigable waters. It may arise with reference to vessels, steamers, and rafts, and upon goods and merchandise carried by them. But it cannot arise upon anything which is fixed and immovable, like a wharf, a bridge, or real estate of any kind. Though bridges and wharves may aid commerce by facilitating intercourse on land, or the discharge of cargoes, they are not in any sense the subjects of maritime liens."

We are not unmindful that the question there under consideration was the right to claim a lien,—necessarily prerequisite to the proceeding *in rem*,—but the reasoning is applicable: bridges and wharves are not instruments of maritime commerce.

So in *The Neil Cochran*, Brown's Ad. 162, F. C., 7996, where damage to a bridge was claimed, Judge Sherman said, in reference to *The Plymouth:*

"From that case, supported by the clearest and most convincing reasoning, the following propositions are deducible:

"First. The jurisdiction of the admiralty over marine

torts depends upon locality—the high seas, or other navigable waters within admiralty cognizance.

"Second. The origin of the wrong must not only be on navigable water, but the substance and consummation of the injury must also be on navigable water.

"Third. The fact that an injury is done by a vessel is of no weight in determining the question of jurisdiction, locality being the test.

"Fourth. If the negligence which occasions the injury is upon navigable waters, but the whole damage resulting therefrom is upon the land, admiralty has no jurisdiction.

"Fifth. The negligence, of itself, furnishes no cause of action; it is *damnum absque injuria;* the whole or substantial cause of action, both negligence and resulting damage, must be upon navigable water to constitute a maritime tort.

"In the light of these propositions what shall be said of the case at bar? Clearly this: That the origin of the wrong was upon navigable water, but that the whole damage resulting therefrom was done upon the land, the bridge being attached to and a part of the land. Indeed, the case at bar and the case of *The Plymouth* are identical in principle. In that case, The Falcon, a steam propeller, was moored at the wharf in the Chicago River; she took fire through the negligence of those in charge of her; the fire communicated to and burned down some large packing houses on the wharf, and the owners of the packing houses filed a libel against the owners of The Falcon, for the resulting damage. The libel was dismissed for want of jurisdiction, and the United States Supreme Court affirmed the decree."

And Judge Longyear, in

The Ottawa, Brown's Ad. 356, F. C. 10616,

where damage to a wharf was claimed, said, after considering earlier cases:

"I must hold that a wharf is but an improvement or extension of the shore; that it is real estate, and that an injury done to it, whether through negligence or design, no matter by what agency, is an injury done wholly on land and not on the water, and, therefore, does not constitute a marine tort."

And this Court said:

"There is no doubt of the proposition that a dry dock

itself is not a subject of salvage service or of admiralty jurisdiction, because it is not used for the purpose of navigation. That was settled in *Cope vs. Vallette Dry Dock Co.*, 119 U. S. 625. But the case was put upon the express ground that a dry dock was like a ferry bridge or sailor's floating meeting house, and was no more used for the purposes of navigation *than a wharf or a warehouse projecting into or upon the water.*"

The Robert W. Parsons, 191 U. S., 17-34, and

in the dissenting opinion in that case (as evidencing the general understanding and acceptance of the doctrine as it relates to torts), will be found the following (41):

"It would seem to follow from these cases that a contract made on land, to be performed on land, and in fact performed on land, is not subject to admiralty jurisdiction. And, likewise, that a tort resulting in injury to something on the land is also not subject to admiralty jurisdiction, although the tort was on waters subject to such jurisdiction."

And in *The City of Milwaukee vs. The Curtis*, 37 Fed., 706,

Judge Jenkins, in denying jurisdiction for damage to a bridge, said:

"It is insisted for the libelant that because this injury happened in the midst of, or in space above, the water, it must be held to have occurred upon the water, and the bridge must be held to be personal property on navigable waters. This contention cannot be upheld. In legal signification land includes not only the surface of the earth, but all under it or over it. It is otherwise with respect to the sea. A suspension bridge is not upon the water, because sustained in space above the water. Nor in any juster sense is a bridge upon the water, because supported upon masonry resting upon the bed of a river. Bridges are merely prolongations over waters of highways upon land. They are not afloat. Like wharves and piers, they are connected with the shore. Unlike wharves and piers, they are obstructions, not aids, to navigation. They concern commerce upon land, not upon the sea. Within the intendment of the maritime law they are—equally with wharves and piers—structures upon or connected with the shore. They pertain to the land, not to the sea; and so are without the cognizance of the admiralty jurisdiction. An injury thereto cannot be said to have occurred upon water. The cause of the injury was a movable thing navigating

> the waters; but the consummation of the wrong was upon an immovable structure above the waters, attached to the land, and not afloat. The absence of admiralty jurisdiction over injuries to such structures is sustained by an overwhelming weight of authority."

And so as to protection piling: An obstruction placed in the navigable channel, which may not now be done without the authority of the Secretary of War and subject to his control.

Secs. 9, 10, 18, Act. March 3, 1899,
Union Bridge Co. vs. U. S., 204 U. S., 364.

Protection piling is placed (usually) at any masonry or crib work in the stream and at shore abutment, to protect the work and prevent or lessen damage to passing craft, *to relieve against the obstruction.* It does not concern or aid water-borne commerce, but lessens the obstructing, impeding character of the structure.

It is not an "aid" to navigation in the sense of the beacon in *The Blackheath,* or in any sense except to alleviate against and lessen dangers arising from an obstruction placed in navigable waters to aid land commerce.

So as to the damages claimed by undermining center abutment and docks from increased flow of current. Neither the dock nor abutment is an aid to navigation. The dock is a mere extension of the shore and is realty.

Smith vs. The Mayor, 68 N. Y., 552.
The Haxby, 94 Fed., 1016,
Washburn on Real Property, p. 389, Vol. 3, (4 ed.).

A bridge and its parts, including abutments and protection piling, are not aids to navigation and are non-maritime.

> "They concern commerce upon land, not upon the sea. Within the intendment of the maritime law they are —equally with wharves and piers—structures upon or connected with the shore. They pertain to the land, not to the sea; and so are without the cognizance of the admiralty jurisdiction."
>
> *City of Milwaukee vs. The Curtis,* 37 Fed., 705-706.

If a damage by undermining a dock or bridge abutment by increased current is within the jurisdiction, it would be difficult

to show why a damage by overflow caused in the same manner would not be, and a pertinent question seems, Where will the limit be placed?

See the reasoning of this Court as to contracts in
Edwards vs. Elliott, 21 Wall., 552-553.

We do not regard it as necessary to consider the argument of convenience or the desirability of uniformity with other maritime nations where the matter is subject to legislatve control. With us "all" cases of admiralty and maritime jurisdiction are included. The profession and the courts have accepted the principle that as to torts the wrong and its consummation or its substantial consummation must be upon waters within the jurisdiction and be maritime in nature.

Damages by and to rafts are held within our jurisdiction; they are not in England.

Wells vs. The Gas Float Whitton, 8 Asp. M. L. C., 272.

When the law of the place of injury gives right of action in death claims, our admiralty takes jurisdiction, and recognizes in a proper case, the admiralty doctrine of division. The English courts do not.

The Circe, Pro. Div. (1906), p. 1.

The principles applicable to tort cases, except as modified by statute, are substantially the same.

> "If the injury was done to the property upon the seas, (for in the case of torts I admit that locality not only is, but ought to be, the criterion of jurisdiction); in like manner remedy is properly had in the admiralty."
>
> *Brown's Civil & Admiralty Law*, Vol. 2, p. 202.

Various modifications have been made in England by statute, which it would be interesting to follow, but it would not further the argument of either party here. See

Admiralty Jur. & Pr. (William & Bruce), p. 73 (3 ed.).

A defining principle has been announced by this Court and acquiesced in generally by bench and bar. It is not a rule of property and no so-called vested interests would be disturbed if

changed. It may be that a large majority of the profession most familiar with and practicing in the admiralty would prefer to have the jurisdiction extended to include all damage done by a ship, whether to buoys, docks, bridges, piles, warehouses or what-not, but such desire cannot change the fact that the case must be one of admiralty *and* maritime jurisdiction, else it may not be prosecuted in the admiralty.

Our jurisdiction is not limited by the ancient English jurisdiction. It is not to be extended by statutory or judicial changes there nor in France, or Germany or Spain or Italy or any maritime nation. But, the question as to the true limits of admiralty jurisdiction is undoubtedly, as Chief Justice Taney says, "exclusively a judicial question, and no State law or act of Congress can make it broader, or (it may be added) narrower, than the judicial power may determine those limits to be." But what the law is within those limits, assuming the general maritime law to be the basis of the system, depends on what has been received as law in the maritime usages of this country.

> "To ascertain, therefore, what the maritime law of this country is, it is not enough to read the French, German, Italian and other foreign works on the subject, or the codes which they have framed; but we must have regard to our own legal history, constitution, legislation, usages, and adjudications as well. The decisions of this court illustrative of these sources, and giving construction to the laws and Constitution are especially to be considered and when these fail us, we must resort to the principles by which they have been governed.
>
> *"But we must always remember that the court cannot make the law, it can only declare it."*
>
> *The Lottawanna,* 21 Wall., 558-576.

The defining limitation adopted by this court is rational, comprehensive and sufficient; moreover, it is so definite as to present no real difficulty in application. *The Blackheath* does not change any previously announced principle but simply brings within these principles a damage to property located in navigable waters, solely an aid to navigation and maritime in nature, *and having no other purpose or function.*

However, if dock damage, protection piling damage, center abutment damage, bridge damage, flood damage are to be included, where shall the defining line be drawn?

There must be something more than location of the damaged property in or immediately contiguous to navigable waters; the *maritime* character must be present.

In *Campbell vs. H. Hackfield & Co., Ltd.*, 125 Fed., 696 (9th C. C. A.),

a case where a stevedore, engaged in unloading cargo at Honolulu, while in the hold of a vessel was injured by the negligence of other stevedores and their common employer, an independent contractor, in denying jurisdiction of an action against the contractor, the Court said, that locality alone was not sufficient; that it must further appear that the cause was maritime in its character, having some relation to a vessel and its owner:

> "The fundamental principle underlying all cases of tort, as well as contract, is that, to bring a case within the jurisdiction of a court of admiralty, maritime relations of some sort must exist, for the all sufficient reason that the admiralty does not concern itself with non-maritime affairs (p. 697)."

In *P. W. & B. R. R. Co. vs. S. S. Co.*, 23 How. 209, jurisdiction was entertained for damage to a vessel by piles negligently left in navigable waters.

The wrong was in navigable waters, and the consummation as well, and the damaged property strictly maritime, but that case and the like cases are not authority for extension of jurisdiction to non-maritime matters, so as to include a claim for damage done to the piles. Moreover, the court held it to be within the rule of maritime law to allow recovery in the admiralty, because,

> "if a ship run foul of an anchor left without a buoy, the person who placed it there shall respond in damages."
>
> *Emerigon*, Vol. 1, p. 417.
>
> *Consulat de la Mer.*, Chap. 243,
>
> *Cleirac*, 70.
>
> "the impinging on an anchor or other injurious impediment negligently left in the way."

the court says (216) has always been considered as coming within the category of maritime torts for remedy in courts of admiralty.

The court further quotes (216) the resolution of the twelve judges:

> "the courts of admiralty may inquire of and redress all annoyances and obstructions that are or may be any impediment to navigation, etc., and injuries done there which concern navigation on the sea."

This is the element which it seems to us determined *The Blackheath*, that the damaged property was not only located in navigable waters, but was of navigation, an *aid* to navigation, without other use or purpose.

No argument is presented here to warrant a broader definition of maritime tort than now exists. England may today give to her courts of admiralty jurisdiction of all claims for damage by a ship, and tomorrow limit to claims for damage *to* a ship. It is our law that it does extend to *all* cases of admiralty *and* maritime jurisdiction, and authority is reposed in this court finally to determine the meaning of the language, and in this, we submit, however desirable it may be from convenience, this court may not be moved by what other maritime nations have or may do by legislative act.

We submit the decree below should be affirmed, fixing the limitation finally as it is now; otherwise uncertainty is introduced and endless litigation invited.

Respectfully submitted,

HARVEY D. GOULDER,
Proctor for Appellee.

S. H. HOLDING,
FRANK S. MASTEN,
Counsel.

Cleveland, Ohio, Nov., 1907.

CLEVELAND TERMINAL AND VALLEY RAILROAD COMPANY *v.* CLEVELAND STEAMSHIP COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

No. 84. Argued December 17, 18, 1907.—Decided February 24, 1908.

The admiralty does not have jurisdiction of a claim for damages caused by a vessel to a bridge or dock which, although in navigable waters, is so connected with the shore that it immediately concerns commerce upon land. *The Plymouth*, 3 Wall. 20, followed, and *The Blackheath*, 195 U. S. 361, distinguished.

THIS is an appeal from a final decree of the United States District Court for the Northern District of Ohio, Eastern Division, in admiralty, dismissing appellants' libel on the appellee's exception thereto, on the ground that the court had not jurisdiction of the subject matter. It comes here directly on a certificate as to the jurisdiction under § 5 of the act of 1891.

The libel was *in rem* against the steam propeller William E. Reis, owned by appellee, and was based on injuries inflicted to the center pier of the swinging or draw bridge spanning the Cuyahoga River, a navigable stream at Cleveland, Ohio; to the protecting piling work surrounding such center pier, and one of the shore abutments of such bridge; and to a dock or wharf next below such bridge, all caused as described in the libel in substance, as follows:

The steamer Reis, during a heavy flood, broke from her

winter moorings and, drifting down the river, struck the merchant propeller Moore at her moorings, forcing her against the steamer Eads, putting her adrift, the three being carried down with the current. The Cleveland Terminal and Valley Railroad Company owned and operated a bridge across the Cuyahoga River below the mooring point of the above-named vessels, the bridge being equipped with a swinging span, supported by a center abutment or pier in the navigable channel. Surrounding the center abutment was piling intended to protect vessels from damage. The railroad company and the Detroit and Cleveland Navigation Company jointly owned a dock below, constructed on piles driven in the bed of the stream and on the shore. It was floored over, but open underneath. As the vessels drifted down the Moore struck and damaged this dock, for which claim is made. The Eads stern brought up against a pier below the bridge. The Moore brought up against the dock abreast the Eads, and the Reis, drifting stern first, entered between the Eads and the Moore, and it is said in so doing forced the Eads into collision with the center pier of the railroad company's bridge, thereby damaging the protection piling about the same, for which damages were claimed. It was also averred that as the three vessels were wedged together at the bridge the stream was partially dammed, causing the water to rise, increasing the velocity of the current underneath the keels of the Eads and the Reis, so that the current undermined the center pier and shore abutment and carried away some of the protection piling, and for restoring that piling and the support under the center pier and the pier damages were claimed. And it was further claimed that by reason of the disaster the railroad company was deprived of the use of its bridge for a period of ten days, and necessarily incurred expense to a large amount.

The usual process issued, the vessel was arrested, and later claimed and bonded by appellee, which subsequently filed its exception to the libel. On the hearing the District Court sustained the exception and dismissed the libel "on the ground

that, although the property injured by said disaster, said dock, said center pier and said protection piling work stood in the navigable water of said river, yet it does not appear from the allegations of the libel that any part of said property so injured was either an instrument of or an aid to navigation, for which reason there is no authority for sustaining the jurisdiction of a court of admiralty over the wrong complained of and the cause of action set forth in the libel."

Mr. Roger M. Lee, with whom *Mr. Virgil Kline* was on the brief, for appellants:

Under the holdings already made by this court, our case falls within admiralty jurisdiction in tort, because both the wrong and the injuries complained of were wholly consummated in navigable water. *The Blackheath*, 195 U. S. 361. This case seems quite sufficient authority for sustaining the jurisdiction in the case at bar. Neither the fact that the beacon in the *Blackheath case* was owned by the Government nor that it was an aid to navigation can be considered such a test of jurisdiction. *The Plymouth*, 3 Wall. 20; *Johnson v. Chicago & Pac. Elevator Co.*, 119 U. S. 388; *Homer Ramsdell Co.* v. *Comp. Gen. Trans.*, 182 U. S. 406, and other cases can be distinguished.

The constitutional grant of admiralty jurisdiction should be construed to cover the case made in this libel. In fact, every case of physical injury to person or property, caused by the negligent act of a ship, while such ship is in navigable water, should be held to fall within the jurisdiction of admiralty, regardless of the locality of the person or property so injured.

This should be held to be the rule in view of all the considerations, which have heretofore aided this court in its constructions of the Federal grant of admiralty jurisdiction; in view of the jurisdiction exercised anciently in England, as well as in this country during the Colonial period, and until the adoption of our Constitution, over the banks, shores and bottom soil of inland rivers and creeks and property located thereon; and in view also of the evident intent of the framers

of the Constitution, the words of the grant, the purposes of a separate system of maritime law and admiralty courts, and the objects on account of which admiralty jurisdiction was conferred upon the Federal courts, as well as the principles underlying the creation of the maritime lien, and the demands of reason and convenience.

Mr. Harvey D. Goulder and *Mr. Frank S. Masten*, with whom *Mr. S. H. Holding* was on the brief, for appellee.

MR. CHIEF JUSTICE FULLER, after making the foregoing statement, delivered the opinion of the court.

The certificate below included the libel in full and certified four questions; but we are not called upon to answer them *seriatim*, and must determine the case on our conclusion as to whether the record discloses a maritime tort justifying the exercise of admiralty jurisdiction.

In *The Plymouth*, 3 Wall. 20, Mr. Justice Nelson, delivering the opinion of the court, said that the true meaning of the rule of locality in cases of maritime torts was that the wrong must have been committed wholly on navigable waters, or, at least, the substance and consummation of the same must have taken place upon those waters to be within the admiralty jurisdiction. A substantial cause of action arising out of the wrong must be complete within the locality on which the jurisdiction depended. *Ex parte Phenix Insurance Company*, 118 U. S. 610.

In *Johnson* v. *Chicago & Pacific Elevated Company*, 119 U. S. 388, the jib-boom of a vessel towed by a steam tug in the Chicago River, at Chicago, struck a building on land through the negligence of the tug and caused damage to it, and it was held that the cause of action was not a maritime tort of which the admiralty court of the United States would have jurisdiction. And Mr. Justice Blatchford said (p. 397): "Under the decisions of this court in *The Plymouth*, 3 Wall. 20, and in *Ex parte Phenix Insurance Company*, 118 U. S. 610, at the